



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/021

Judgment No.: UNDT/2012/088

Date: 12 June 2012

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

DESTANNE DE BERNIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Thomas Elftmann, UNDP

Introduction

1. By application filed with the Dispute Tribunal on 16 March 2012, the Applicant contests the decision of the Administrator of the United Nations Development Programme (“UNDP”) dated 19 December 2011 to impose on him the disciplinary measure of demotion with deferment of his eligibility for consideration for promotion for a period of one year.

2. He requests the Tribunal to rescind the contested decision and to award him compensation for the moral damage he suffered.

Facts

3. The Applicant entered the service of UNDP in 1988. After holding various positions, he was appointed on 16 November 2004 to the post of Resident Representative of UNDP and United Nations Resident Coordinator in Algeria, at the D-1 level. As such, he was the Secretary-General’s designated official for security in that country.

4. On 11 December 2007, the United Nations headquarters in Algiers was the target of a car-bomb attack that killed 17 United Nations staff members and injured many others, including the Applicant.

5. After the United Nations Department of Safety and Security conducted an investigation into the attack and submitted its preliminary report to the Secretary-General in January 2008, the Secretary-General established an Independent Panel on Safety and Security of United Nations Personnel and Premises Worldwide (“the Independent Panel on Safety and Security”).

6. Upon the instruction of UNDP, the Applicant returned to France, his country of residence, in mid-January 2008 and was placed on special leave with full pay.

7. In March 2008, the Applicant spoke with members of the Independent Panel on Safety and Security on several occasions.

8. On 17 March 2008, he was reassigned to the UNDP Liaison Office in Brussels.

9. That same month, he submitted a compensation claim, under appendix D to the Staff Rules, to the Advisory Board on Compensation Claims, which considers claims for compensation in the event of illness, injury or death attributable to the performance of official duties.

10. The report of the Independent Panel on Safety and Security was made public on 9 June 2008. The Panel did not identify individual accountability of United Nations personnel, but found evidence which appeared to show that several staff members up and down the hierarchy may have failed to respond adequately to the attack of 11 December 2007.

11. On 19 June 2008, the Secretary-General appointed an Independent Panel on Accountability related to the attack on United Nations premises in Algiers (“the Independent Panel on Accountability”).

12. On 25 July 2008, the Secretary-General acknowledged that the injury to the Applicant’s right wrist was attributable to the performance of official duties.

13. By letter dated 1 August 2008, the Chair of the Independent Panel on Accountability invited the Applicant to an interview to be held on 15 and 18 August 2008. However, the interview did not take place, as the Applicant was placed on sick leave as of 11 August 2008.

14. The Independent Panel on Accountability submitted its report to the Secretary-General on 21 September 2008.

15. On 22 November 2008, the Applicant resumed his duties at the UNDP Liaison Office in Brussels.

16. In June 2009, the Secretary-General requested the Chair of the Independent Panel on Accountability to reopen the investigation in order to interview the Applicant.

17. On 9 July 2009, the Secretary-General accepted the recommendation of the Advisory Board on Compensation Claims to recognize the severe depression suffered by the Applicant as being attributable to the performance of official duties. He was therefore awarded compensation equivalent to a 5 per cent permanent loss of function.

18. By letter dated 30 July 2009, the Chair of the Independent Panel on Accountability asked the Applicant to confirm his availability for an interview scheduled to take place in New York on 27 and 28 August 2009.

19. By handwritten note also dated 30 July 2009, the Applicant's doctor informed the Director of the UNDP Legal Support Office that he had authorized the Applicant to attend the interview, on four conditions: that the Applicant should be accompanied by a "person of confidence" of his choice; that the interview should take place in the best possible conditions of physical and psychological comfort; that the interview should be conducted in French; and that the interview should last no longer than four hours per day, with two sessions of two hours per day.

20. By letter dated 10 August 2009, the Director of the Legal Support Office replied to the Applicant that the Independent Panel on Accountability had accepted the conditions expressed in his doctor's handwritten note, provided that they did not conflict with the Panel's terms of reference. Accordingly, the Applicant could be accompanied by a doctor or a nurse but who may not take part in the proceedings; the interview would not last longer than four hours per day, with two sessions of two hours per day; the Applicant could request a break in the proceedings at any point; and simultaneous interpretation in French would be provided for him.

21. In an email sent on 12 August 2009 to the Director of the Legal Support Office, the Applicant asserted that certain conditions formulated by his doctor had not been understood. He attached to the email a message in which his doctor insisted on the need for the Applicant to be accompanied by a "person of confidence" during the interview.

22. The Applicant's email was forwarded to the Chair of the Independent Panel on Accountability, who replied to the Director of the Legal Support Office on 14 August 2009 that the Panel was prepared to accede to the Applicant's request, provided that he clarified the role and purpose of the "person of confidence".

23. By email dated 17 August 2009, the Applicant informed the Director of the Legal Support Office of the name of the person he had chosen to serve as his "person of confidence".

24. An exchange of correspondence ensued, during which the Independent Panel on Accountability refused to allow the Applicant's chosen "person of confidence" to attend the interview because he was the Chairperson of the UNDP Staff Council. After consulting the United Nations Medical Service, the Independent Panel on Accountability finally accepted the Applicant's choice and he was informed thereof by the Director of the Legal Support Office by email dated 9 October 2009. By the same email, the Director stated the new dates proposed by the Panel for the interview and explained that the person chosen by the Applicant could only attend in his personal capacity and not as a staff representative; that the person would remain silent and be subject to the authority of the Chair of the Independent Panel on Accountability during the interview; and that the person should agree to maintain confidentiality of the information exchanged. On 13 October 2009, not having received a reply from the Applicant, the Director of the Legal Support Office requested confirmation of his availability for the proposed dates, namely 26 and 27 October 2009.

25. In an email sent on 14 October 2009 to the Director of the Legal Support Office, the Applicant noted regrettably that the Independent Panel on Accountability "continue[d] to refuse to take into account the requests of [his] medical doctor, [a fact which] prevent[ed] him from giving [his] testimony under acceptable conditions". He also asked that, henceforth, all communications from the Director of the Legal Support Office be addressed to his then Legal Counsel, rather than himself, in order to safeguard his health.

26. On 15 October 2009, the Director of the Legal Support Office asked Counsel for the Applicant which conditions had not been met.

27. In an email sent on 16 October 2009 to the Applicant, his doctor informed him that he opposed the Applicant's participation in the interview for strictly medical reasons. He said that the new conditions proposed by the Administration did not satisfy the requirements he had laid down. In particular, the Applicant should be able to seek advice from the chosen "person of confidence" in order to lessen the impact of the interview on his health.

28. By letter dated 21 October 2009, Counsel for the Applicant informed the Director of the Legal Support Office that the Applicant could be interviewed, on the following conditions: that the Applicant should be accompanied by his Counsel, who should have the right to intervene at any moment; that the Applicant's participation should be contingent upon a favourable medical opinion from his doctor; that the interview should be video recorded and a copy thereof should be provided to the Applicant following the interview; that the cost of travel of the Applicant and his Counsel to New York should be covered in full by the Organization; and that a French copy of the draft report should be provided to him for comments. He further stated that the Applicant was willing to answer the questions of the Independent Panel on Accountability in writing.

29. The 21 October letter was transmitted to the Director of the United Nations Medical Service, who communicated his opinion to the Assistant Secretary-General for Human Resources Management on 23 October 2009. He indicated, *inter alia*, that the new conditions set out by Counsel for the Applicant had no medical relevance and that if these new conditions were to prevent the interview from taking place, he recommended asking the Applicant's doctor for a confidential medical report specifying in particular his diagnosis and the current treatment plan and, if necessary, requesting a second specialist opinion or convene a medical board to determine the limits to which the Applicant's health could be used to influence "due process".

30. The interview did not take place on 26 and 27 October 2009.

31. By letter dated 2 November 2009, which then Counsel for the Applicant said he did not receive, the Director of the Legal Support Office informed Counsel that the Independent Panel on Accountability had agreed that he could attend the interview as an observer, on certain conditions. The Director concluded her letter by recalling that staff members had an obligation to cooperate with all duly authorized audits and investigations.

32. By letter dated 18 November 2009, the Chair of the Independent Panel on Accountability recommended to the Secretary-General that the Applicant should be subject to disciplinary action for breach of his duty to cooperate with the Panel. He also recommended that charges should be brought against him on the basis of the findings and recommendations contained in the report of 21 September 2008.

33. On 7 December 2009, the Director of the Legal Support Office contacted the UNDP Office of Audit and Investigations and requested that it open an investigation into the Applicant's alleged failure to cooperate.

34. On 18 February 2010, the Applicant was informed by the Office of Audit and Investigations that he was the subject of an investigation for failing to cooperate with a duly authorized investigation. At the beginning of March 2010, he was interviewed by a staff member from the Office of Audit and Investigations. On 11 March 2010, while the investigation was proceeding, the Applicant forwarded to the Office of Audit and Investigations a copy of the email sent to him by his doctor on 16 October 2009.

35. Towards the end of July 2010, the Office of Audit and Investigations provided the Applicant with a copy of the draft investigation report and invited him to provide comments, which Counsel for the Applicant did on 27 August 2010

36. In its investigation report dated 8 October 2010, the Office of Audit and Investigations concluded that, as of 14 October 2009, the Applicant had refused to participate in the interview scheduled with the Independent Panel on Accountability on 26 and 27 October 2009. The case was therefore referred to the

Legal Support Office to determine whether disciplinary measures should be considered.

37. By letter dated 9 November 2010, the Applicant was notified that he had been charged with misconduct for failing to cooperate with the duly authorized investigation of the Independent Panel on Accountability, in contravention of staff rule 1.2(c). The Applicant, who was subject to disciplinary measures under staff rule 10.1, was invited to respond to the charges within 15 days.

38. By letter dated 13 January 2011, Counsel for the Applicant submitted his comments in response to the letter dated 9 November 2010.

39. On 30 November 2011, the Applicant was advised that the United Nations Joint Staff Pension Committee had determined that he was incapacitated for further service that was reasonably compatible with his abilities because of his health and was therefore entitled to a disability benefit. Consequently, he was separated from service effective 20 December 2011.

40. By letter dated 19 December 2011, the UNDP Administrator advised the Applicant that, following a review of his case, a disciplinary measure of demotion with eligibility for consideration for promotion deferred for a period of one year was being imposed, on the ground that he had failed to attend the 26 and 27 October 2009 interview to which he had been invited by the Independent Panel on Accountability.

41. The new Counsel retained by the Applicant on 15 March 2012 filed an application with the Dispute Tribunal on 16 March 2012.

42. On 16 May 2012, the Chairperson of the UNDP Staff Council submitted a motion to file a friend-of-the-court brief, which was rejected by the Tribunal by Order No. 104 (GVA/2012) dated 4 June 2012.

43. On 7 June 2012, the Tribunal held a hearing in which Counsel for the Applicant and Counsel for the Respondent participated by videoconference. Following the hearing, Counsel for the Applicant, at the request of the Tribunal,

stated that the Applicant was not requesting that his name should be stricken from the published judgement.

Parties' submissions

44. The Applicant's contentions are:

a. By imposing the contested disciplinary action on him, the Administration did not act in good faith and did not afford him fair treatment. Instead, it penalized him for asserting his right to due process and his right to health protection;

b. The Independent Panel on Accountability was established outside the normal framework for investigations, because former staff regulation 10.2 vested the Secretary-General with the power to impose disciplinary measures and rule 10.1(c) of the Staff Rules that came into effect in 2010 stipulates that "[t]he decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority". However, the Independent Panel on Accountability had no such delegated authority. Moreover, former staff rule 110.5 vested the joint disciplinary committees with the power to advise the Secretary-General on disciplinary matters;

c. The Independent Panel on Accountability acted in violation of the Applicant's right to due process. Its terms of reference clearly provided that its purpose was disciplinary in nature. Yet, the letter of 18 November 2009 from the Chair of the Panel addressed to the Secretary-General makes it clear that the Panel had already reached the conclusion that the Applicant should be charged with misconduct on the basis of the findings and recommendations of the September 2008 report. The true purpose of the second interview with the Applicant was thus to compel him to provide testimony against himself without the right to effective counsel;

d. The Applicant's actions cannot be categorized as misconduct, as defined by the former United Nations Administrative Tribunal. His actions were prompted by concerns over the possible effects of the proceedings on his health. His illness is not disputed by the Respondent. Each and every proposal made by the Applicant was initially rejected by the Independent Panel on Accountability and, despite some concessions, there was never any agreement that respected his health limitations. On the contrary, the Independent Panel on Accountability decided to impose its own conditions. Furthermore, the opinion of the Director of the United Nations Medical Service issued on 23 October 2009 was not based on a medical examination of the Applicant. Lastly, despite the recommendation by the Director of the Medical Service, the Administration never requested the Applicant to provide detailed medical reports;

e. The Applicant did not refuse to participate in any investigation. Rather, he cooperated with the Department of Safety and Security and the Independent Panel on Safety and Security. It was in fact the high-handed manner of the Chair of the Independent Panel on Accountability that was the cause of the problem.

45. The Respondent's contentions are:

a. The Applicant's claims for compensation for damages suffered as a result of the alleged violation of his right to due process by the Independent Panel on Accountability should be rejected, since he did not request a management evaluation of the decision to invite him to an interview;

b. By deciding to create the Independent Panel on Accountability and by mandating it to establish the facts, the Secretary-General properly exercised his discretionary power. While it is true that the Panel was also tasked with making recommendations as to whether disciplinary proceedings should be commenced, such proceedings are initiated through a charge of misconduct and not through a recommendation. Former staff rule 110.5 dealt with a specific procedural aspect that is not relevant to the

Applicant's case, as he was not the subject of a disciplinary process related to the attack of 11 December 2007;

c. The Independent Panel on Accountability did not disregard the Applicant's right to due process. The fact that the Chair of the Independent Panel on Accountability recommended in his letter of 18 November 2009 that the Applicant should be charged with misconduct based on the findings and recommendations of the September 2008 report does not mean that the Panel had already reached a decision as to the Applicant's guilt as of September 2008. Furthermore, the Applicant had no right to be assisted by counsel during the interview. According to the internal practice of the Organization, stemming from Rule 10.3(a) of the Staff Rules, such a right does not apply at the administrative investigation stage, but only when the disciplinary process is initiated. In addition, the Independent Panel on Accountability sent the Applicant a copy of its terms of reference on 1 August 2008. Those terms of reference clearly explained the Panel's mandate and the type of evidence the Applicant was expected to provide, and the Applicant never requested any further clarifications;

d. The Applicant's medical condition did not prevent him from attending the interview with the Independent Panel on Accountability. The Administration fully accepted the diagnosis made by the Applicant's doctor; there was therefore no need to seek a second specialist opinion or to constitute a medical board. The Administration also fulfilled all the conditions set by the Applicant's doctor, who had initially asked that the Applicant be accompanied by a "person of confidence", which the Independent Panel on Accountability accepted. However, that condition was subsequently modified and the email of 16 October 2009 was only brought to the attention of the Administration in March 2010, during the investigation conducted by the Office of Audit and Investigations. The Director of the Medical Service concluded that the new, legal conditions set out by counsel for the Applicant on 21 October 2009 had no medical relevance. The Applicant was therefore obliged to follow the request of the Independent Panel on Accountability, as there was no indication that he

was not fit to attend the interview: he was not on sick leave on 26 and 27 October 2009 and his doctor never stated that the Applicant was unable to attend the interview. He should be held to account for his actions as the Secretary-General's designated official for security in Algeria.

Consideration

46. The Applicant contests the UNDP Administrator's decision of 19 December 2011 to impose upon him the disciplinary measure of demotion with eligibility for consideration for promotion deferred for a period of one year.

47. When the Tribunal is seized of an application contesting the legality of a disciplinary measure, it must examine, first, whether there are any procedural irregularities; second, whether the alleged facts have been established; third, whether the facts amount to misconduct; and lastly, whether the disciplinary measure imposed is proportionate to the misconduct (Appeals Tribunal Judgments *Mahdi* 2010-UNAT-018, *Abu Hamda* 2010-UNAT-022, and *Maslamani* 2010-UNAT-028).

Regularity of the procedure

48. To criticize the contested disciplinary measure, the Applicant contends that the Secretary-General acted unlawfully by entrusting his disciplinary power to the Independent Panel on Accountability that he had established. However, the Tribunal finds that the Secretary-General had given the Independent Panel on Accountability the mandate to investigate the responsibilities associated with the attack against the United Nations premises in Algiers, and that the investigation had absolutely no bearing on the facts for which the Applicant was sanctioned, namely the refusal to answer an invitation to attend an interview scheduled for 26 and 27 October 2009 in New York.

49. Therefore, all the irregularities allegedly committed during the Independent Panel on Accountability's investigation do not affect the legality of the disciplinary measure imposed and the Tribunal notes that the Applicant did

not point to any irregularities in the investigation itself or the disciplinary procedure that led to the contested disciplinary measure in the present case.

50. Thus, since the Applicant failed to establish any irregularities in the procedure followed to impose the disciplinary measure on him, the Tribunal must now rule on whether the alleged facts have been established.

Establishment of the alleged facts

51. The parties do not dispute the fact that staff members have a duty to cooperate with investigations authorized by the Secretary-General, in accordance with staff rule 1.2(c):

Staff members have the duty to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action and to cooperate with duly authorized audits and investigations ...

52. The decision to discipline the Applicant by demoting him with eligibility for consideration for promotion deferred for a period of one year was prompted solely by the fact that he refused to answer the Independent Panel on Accountability's invitation to attend an interview scheduled for 26 and 27 October 2009 in New York. The Tribunal must therefore only consider whether the Applicant really did refuse to answer that invitation.

53. The Applicant contends that he did not attend the interview because his doctor opposed it, as was stated in the email he received on 16 October 2009. It is very clear from that document, submitted by the Applicant, that the doctor was categorically opposed to his patient going to New York for that interview, and that the Applicant could legitimately believe that it was impossible for him to travel to New York for health reasons.

54. While the Independent Panel on Accountability and the Administration—given their many, patient earlier attempts to interview the Applicant by agreeing to most of the interview conditions that he had imposed—reasonably thought on the day of the interview that the Applicant had deliberately refused to show up, as they were unaware of the email of 16 October 2009 which had not then been

transmitted to them, the Administration was in possession of that document when the disciplinary measure was imposed on 19 December 2011. The 16 October 2009 email gave the Applicant a medical excuse for not answering the invitation.

55. When a staff member presents the Administration with a medical certificate from his or her doctor justifying an absence or the inability of the staff member to meet any professional obligation, and if the Administration doubts the validity of the medical certificate provided, the Administration has the responsibility to have the health of the staff member examined by its own medical service or, if disputed, by a medical board. Failing this, the medical certificate presented by the staff member is supposed to reflect his or her actual health status.

56. In the instant case and to the extent that the legality of a decision is determined as at the date on which it is taken, when the UNDP Administrator imposed the disciplinary measure on the Applicant on 19 December 2011, the Administrator could not have been unaware that the Applicant had presented a medical certificate—the validity of which was never disputed by the Administration—to justify his absence. While the Applicant could be criticized for not forwarding the 16 October 2009 certificate to the Administration upon receiving it, in order to notify the Independent Panel on Accountability ahead of time that he would not be attending the interview scheduled for 26 and 27 October 2009, that oversight, as regrettable as it may be, was not the reason for the disciplinary measure.

57. Thus, the Tribunal finds that the disciplinary measure was based on inaccurate facts and should be rescinded.

Compensation

58. The Applicant is seeking compensation for moral damage resulting from the unjustly imposed disciplinary measure.

59. While the Respondent contends that the Applicant's claim for compensation for the damage suffered should be rejected because he failed to request a management evaluation of the decision to invite him to attend an

interview, this receivability challenge must be rejected by the Tribunal since, in the present case, the Tribunal is only ruling on the legality of the disciplinary measure imposed and on the harm it caused the Applicant. Besides, in disciplinary matters, the staff member is not required to request a management evaluation before filing an application with the Tribunal for rescission of the disciplinary measure imposed and compensation for the resulting damage.

60. The Tribunal finds that the moral damage suffered by the Applicant as a result of the disciplinary measure is substantial. Indeed, the disciplinary measure was imposed on the staff member on 19 December 2011, the day before the decision to terminate his contract for health reasons came into effect. That unlawful disciplinary measure inevitably exacerbated his nervous breakdown.

61. In the circumstances of the present case, the Tribunal finds that ordering the Respondent to pay the Applicant compensation in the amount of USD8,000 represents a fair assessment of the damage.

Conclusion

62. In view of the foregoing, the Tribunal DECIDES:

- a. The disciplinary measure of demotion with deferment of his eligibility for consideration for promotion for a period of one year is rescinded;
- b. The Respondent is ordered to pay the Applicant compensation in the amount of USD8,000;
- c. The above-mentioned compensation shall bear interest at the United States prime rate with effect from the date this judgment becomes executable, plus 5 per cent after 60 days from the date this judgment becomes executable until payment of the said compensation.

(Signed)

Judge Jean-François Cousin

Dated this 12th day of June 2012

Entered in the Register on this 12th day of June 2012

(Signed)

René M. Vargas M., Registry, Geneva